KOKOMEWAH SDN. BHD.

v.

DESA HATCHERY SDN. BHD.

COURT OF APPEAL, KUALA LUMPUR
DATO' HJ. ABU MANSOR BIN ALI JCA
DATO' HJ. ABDUL MALEK BIN HJ. AHMAD J
DATUK WIRA HJ. MOHD. NOOR BIN HJ. AHMAD J
[CIVIL APPEAL NO. S-02-26 OF 1995]
21 JULY 1995

CONTRACT: *Formation - Letter of Intent - Letter of Intent agreed on certain matters but other matters to be agreed upon in supplementary agreement - Supplementary agreement not executed - Whether Letter of Intent a concluded and binding contract - Promissory estoppel - Applicability - Whether appellant had acted to its detriment pursuant to alleged contract.*

In 1984 the parties herein entered into a contract whereby the appellant agreed to build a hatchery for the respondent in Labuan. In 1985, whilst the contract was in progress, the parties signed a Letter of Intent by which they agreed to revise the said contract with new terms and conditions, and an additional bank guarantee was issued by the appellant to cover the new contract. The said new terms were supposed to be incorporated into a separate supplementary agreement but this agreement, somehow, was never signed or executed. The facts showed that the Letter of Intent was not exhaustive in nature and that despite the parties agreeing to some matters therein, some other matters of importance remained to be worked out and agreed upon, purportedly *vide* the said abortive supplementary agreement.

As a result of gross delay in the construction of the hatchery the respondent terminated the said contract. The appellant sued the respondent and argued before the trial Judge that the Letter of Intent herein constituted a concluded and binding contract, as what had to be worked out thereafter was only minor details. The respondent, according to the appellant, was estopped from denying the existence of the contract. The learned Judge dismissed the claim ruling that the Letter of Intent was not a concluded contract and that, by reason of the delay, the determination of the 1984 contract by the respondent was justified. The appellant appealed.

Held:

Per Abu Mansor bin Ali JCA (Abdul Malek bin Hj. Ahmad, Mohd Noor bin Hj. Ahmad JJ concurring):

[1] There is no merit in the appellant's contention that there was a concluded contract in the Letter of Intent. The learned trial Judge was correct in holding, on the evidence, that the RM 38.97 million was not a finalised sum and that the Letter of Intent was not a concluded contract. There still remained some matters to be worked out and agreed upon after the conclusion of the Letter of Intent and the same would only become a concluded contract if the supplementary agreement is signed.

[2] Thus at the time of the termination of the agreement the only contract existing was that of the 1984 contract. On the facts, and having regard to the undue delay in the progress of the project, there is no ground to disturb the trial Judge's finding that the determination of that contract was justified. The trial Judge was also right in awarding the respondent damages under the counter claim.

Per Mohd Noor bin Hj. Ahmad J:

[1] In raising the issue of estoppel the appellant was clearly relying on promissory estoppel. For the promissory estoppel to apply the appellant must show that by reason of the alleged contract he had changed his position to his detriment. This the appellant failed to show.

[2] It is evident that the appellant had till the end been treating the 1984 contract as still in force and that this stance was only changed for the purpose of litigation. The giving of the additional letter of guarantee and the bank guarantee by the appellant was geared mainly towards the execution of the supplementary agreement, which was never signed. On this ground the plea of estoppel must also fail. Further the doctrine operates only by way of defence and not as a cause of action.

[3] In the face of overwhelming evidence of defaults on the part of the appellant in the performance of the contract, it is not open for them to allege that in determining the contract the respondent had acted unreasonably or vexatiously or that the determination was wrongful. The conduct of the respondent in not terminating the contract much earlier, under the circumstances, tantamounts only to the giving of indulgence to the appellant.

[Appeal dismissed].

[**Bahasa Malaysia** Translation of Headnotes]

KONTRAK: *Pembentukan - Surat Hasrat - Surat Hasrat bersetuju tentang beberapa perkara tetapi meninggalkan perkara lain untuk dipersetujui dalam perjanjian sampingan - Perjanjian sampingan tidak dimeterai - Samada Surat Hasrat suatu kontrak yang mengikat - Estopel janji - Pemakaian - Samada perayu telah bertindak dengan cara yang memudaratkannya ekoran dari kontrak yang dikatakan.*

Pada tahun 1984 perayu dan responden telah memeterai satu kontrak di mana perayu bersetuju untuk membina satu tempat pengeraman untuk responden di Labuan. Pada tahun 1985, semasa kontrak tersebut sedang berjalan, mereka telah menandatangani satu Surat Hasrat di mana mereka bersetuju untuk mengkaji semula kontrak tersebut bertujuan memasukkan beberapa terma dan syarat baru ke dalamnya, dan berikutannya, untuk menampung kontrak baru itu, perayu menyerahkan satu surat jaminan bank kepada responden. Terma-terma baru berkenaan sepatutnya diserapkan kedalam satu perjanjian sampingan, tetapi perjanjian ini, bagaimanapun, tidak pernah ditandatangani atau dimeterai. Fakta kes menunjukkan bahawa Surat Hasrat tersebut tidaklah lengkap dan walaupun mereka telah bersetuju tentang beberapa perkara terdapat perkara-perkara yang akan hanya dipersetujui dalam perjanjian sampingan yang tidak jadi dimeterai itu.

Oleh kerana berlaku kelewatan yang serius dalam pembinaan tempat pengeraman tersebut perjanjian di atas telah ditamatkan oleh responden. Perayu menuntut ganti rugi dan berhujah di hadapan yang arif Hakim bahawa Surat Hasrat berkenaan telah menjadi satu kontrak yang mengikat, oleh kerana apa yang perlu dipersetujui selepas ianya ditandatangani hanyalah butiran khusus yang kecil. Menurut perayu responden telah di-estop dari menyangkal kewujudan kontrak berkenaan. Yang arif Hakim menolak tuntutan tersebut dan memutuskan bahawa Surat Hasrat disini bukan satu kontrak yang termeterai, dan, disebabkan oleh kelewatan yang berlaku, penamatan kontrak tersebut oleh responden adalah wajar. Perayu merayu.

Diputuskan:

Oleh Abu Mansor bin Ali HMR (Abdul Malek bin Hj. Ahmad, Mohd Noor bin Hj. Ahmad HH sependapat):

[1] Tidak ada merit dalam hujah perayu bahawa Surat Hasrat disini telah mewujudkan satu kontrak. Yang arif Hakim adalah betul apabila beliau memutuskan, di atas keterangan, bahawa jumlah RM 38.97 juta yang disebut itu bukanlah satu jumlah yang muktamad, dan bahawa Surat Hasrat tersebut bukan merupakan satu kontrak yang termeterai. Terdapat beberapa perkara yang perlu dihuraikan dan dipersetujui selepas Surat Hasrat tersebut dan perkara-perkara ini akan hanya menjadi satu kontrak bilamana perjanjian sampingan itu dimeterai.

[2] Semasa penamatan kontrak oleh responden, kontrak yang wujud hanyalah kontrak pada tahun 1984 itu. Di atas fakta, mengambil kira kelewatan yang tidak patut berhubung pelaksanaan projek berkenaan, tidak terdapat alasan untuk mengubah keputusan Hakim perbicaraan bahawa penamatan kontrak tersebut adalah wajar. Hakim perbicaraan juga betul apabila membenarkan ganti rugi kepada responden di bawah tuntutan balas.

Oleh Mohd Noor bin Hj. Ahmad H:

[1] Dalam membangkitkan soal estopel perayu jelas bergantung kepada estopel janji. Bagi menjadikan estopel janji terpakai perayu hendaklah menunjukkan bahawa, disebabkan oleh kontrak yang dikatakan itu, dia telah mengubah kedudukannya dengan cara yang memudaratkan dirinya sendiri. Ini gagal dibuktikan oleh perayu.

[2] Adalah jelas bahawa perayu sehingga keakhirnya menganggap kontrak pada tahun 1984 itu sebagai masih berkuatkuasa dan pendiriannya ini hanya diubah untuk tujuan perbicaraan ini. Pemberian surat jaminan tambahan dan surat jaminan bank oleh perayu adalah ditujukan kepada pemeteraian perjanjian samping yang mana tidak pernah pun ditandatangani. Atas alasan ini hujah estopel semestinya juga gagal. Tambahanlah pula doktrin ini hanya boleh dilaksanakan sebagai satu pembelaan dan bukan sebagai satu kausa tindakan.

[3] Berdepan dengan limpahan bukti bahawa telah berlaku kemungkiran di pihak perayu berhubung pelaksanaan kontrak berkenaan, adalah tidak terbuka bagi mereka untuk mengatakan bahawa penamatan kontrak itu adalah salah, ataupun bahawa responden telah bertindak dengan cara yang tidak munasabah, ataupun dengan cara yang menyusahkan perayu.

[Rayuan ditolak]

Cases referred to:
Combe v. Combe [1951] All ER 767

For the appellant - Cecil Abraham (Colin Lau & Lorraine Cheah with him); M/s. Colin Lau & Co.
For the respondent - Vinayak P. Pradhan (Ken Chiam with him); M/s. Chin Lau Wong & Foo

JUDGMENT

Hj. Abu Mansor bin Ali JCA:

The appellant in this appeal advanced ten grounds of appeal but they could conveniently be divided into three and the appellant took them together and that greatly assisted us.

Firstly, in grounds 2 and 3, the appellant contended that on the evidence as a whole, by the Letter of Intent entered between the appellant and respondent dated 3 April 1985 (Letter of Intent), there was a concluded contract. The respondent was thereby estopped from denying there was such a contract.

The appellant therefore says the learned trial Judge was plainly wrong when he held, at p. 55 of the appeal record:

> To my mind there could only be a new contract after the parties have agreed on all the matters which required to be agreed upon and a finalised contract sum was reached.
>
> Having carefully considered the submissions of learned Counsel on both sides and the evidence, both oral and documentary, I have come to the conclusions that (1) the sum of Ringgit Malaysia 37,971,579 was not a finalised contract sum; (ii) the letter of intent dated 3 April 1985 was not a concluded contract (iii) at all material time the parties have considered themselves to be still governed by the 1984 contract."

Counsel for the appellant contended before us that the learned trial Judge's finding was against the weight of the evidence before him.

Appellant's Counsel referred us firstly to the contract between the appellant and the respondent on 16 November 1983 when the respondent employed the appellant to build a hatchery in Labuan. This contract was substituted by another contract dated 2 May 1984 (called the 1984 contract) for a contract price of RM18,827,618.

Whilst this 1984 contract was in progress, it was not disputed the parties had three meetings, on 16 March 1985, 18 March 1985 and 30 March 1985. The meetings resulted in the parties signing the Letter of Intent on 3 April 1985. As we have mentioned, the appellant contended that this Letter of Intent produced a concluded contract, which is denied by the respondent. The appellant further contended that the supplementary agreement to be signed was a mere formality in the concluded contract.

Appellant's Counsel referred us to the minutes of the meeting on 30 March 1985 (Vol. 4 p. 1195) and at p. 1192 the parties had agreed as follows:

> (a) **Supplementary Agreement**
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> A supplementary agreement incorporating all revised bills, rates, extension of completion dates and etc. would be prepared and signed by both parties. The draft would be prepared by KPD's Legal Affairs Officer.
>
> (b) **Advance**
>
> The agreed advance was 15% of the contract sum subject to a maximum of RM3.7 million and its release and repayment would be administered in accordance with the Treasury Instructions except that a personal guarantee for the whole sum of the advance would replace a bank guarantee.
>
> (c) **Performance bond**
>
> A performance bond of an amount equal to five percent (5%) of the contract sum would be produced by Koko Mewah. Desa Hatchery would reimburse Koko Mewah the cost of the performance bond upon presentation of receipts by the latter.
>
> (d) **Liquidity Damages**
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> The agreed liquidity damages are as follows:
>
> (a) RM6,500 per day for the processing plant building.
>
> (b) RM6,500 per day for the hatchery building
>
> (c) RM1,000 per day for a parentstock farm.
>
> (d) RM1,000 per day for a boiler farm.

(e) **Confirmation of Prices**

For items without any agreed rates, Desa Hatchery was required to confirm the rates within two full working days after receipt of the quotations of the items.

The appellant contended that after the meeting of 30 March 1985 what had been taken to Sabah Cabinet *vide* cabinet paper no. 18/85 was that the Cabinet had approved a loan of RM19.14 million and it also agreed to re-schedule the loan of RM18,827,618 making a total of RM37,971,579.27. The appellant's Counsel submitted that when the Letter of Intent was executed on 3 April 1985, the contract price was agreed and what had to be worked out were only minor details.

The appellant's Counsel went even further to suggest that a contract was concluded because the appellant had even partly performed some of the terms of the Letter of Intent. An illustration of this was where the appellant pursuant to cl. 2(b) of that Letter of Intent had furnished to the respondent a bank guarantee of 5% of the new contract price.

On the first issue, we are of the view there is no merit in the appellant's contention that there was a concluded contract in the Letter of Intent. We uphold the learned trial Judge's finding, on the evidence, when he held as referred to above that the RM37,971,570.27 was not a finalised contract sum and that the Letter of Intent dated 3 April 1985 was not a concluded contract. We are with the learned trial Judge when he found at p. 52 of the appeal record:

> In my opinion the contents of the draft minutes of the Ministry which were confirmed by PW3 and the witnesses of the defendant would support strongly the contention of Counsel for the defendant that the sum of about RM37.8 million as stated in Exhibit P1 was not a concluded contract price. There were still a number of matters which remained to be dealt with at the end of the meeting on 18 March 1985 and that was why it was necessary to have a meeting on 30 March 1985. Even after 30 March meeting there still remained some matters to be worked out and agreed upon. It is therefore not improbable that the figure of RM37,971,579.27 was intended to be an estimate to be submitted to the Cabinet in order to obtain an increase in the budget for the project and not a concluded contract sum.

We found as a fact that the learned Judge was right that there were items, as spelt out in the Letter of Intent, to be worked out and agreed upon such as (C) internal wiring (Vol. 8 p. 2595) and (d) internal plumbing (Vol. 11 p. 269). All these were be incorporated into the supplementary agreement and it only became a concluded contract upon the signing of such supplementary agreement.

Apart from this supplementary agreement, there was the contention of the appellant's Counsel that there was a concluded contract because pursuant to cl. 2(b) of the Letter of Intent, the furnishing of a bank guarantee had been given by the appellant. It was clearly proved before us that such bank guarantee was not furnished by the appellant before 30 April 1985.

It was also contended by the appellant's Counsel that the payment of the further advance of RM1,817,238.20 paid pursuant to the Letter of Intent was further proof that there was a concluded contract. It was in evidence that the advance payment was made on 4 April 1985 (Vol. 4 p. 1198). We accept the respondent's Counsel submission that it was paid in consequence of the additional letter of guarantee being furnished on 4 April 1985.

We deal now with grounds 4, 5, 6, 7, and 8 of the appellant's grounds of appeal taken together which is specifically the second issue as found by the learned trial Judge in the Court below. That issue is if the contract between the parties at the time of termination was not contained in the Letter of Intent of 3 April 1985 by May 1984 contract, was the appellant in breach of his obligations?

The learned trial Judge after a long and careful judgment and tracing in detail the several aspects of the appellant's contract held at p. 78 of the appeal record:

> In all the circumstances, I am of the opinion that there was delay and the plaintiff had failed to comply with the notice to step up work as well as the notice to rectify works. In the result the determination of the contract by the defendant, in my opinion, was justified.

The appellant's Counsel contended that the learned Judge was wrong when he held that the termination was justified. Under this heading the suggestion that the appellant was slow was also denied by the appellant. The appellant also contended that the contract was terminated because at the time of the said termination, the appellant's father-in-law Y.B. Dato Harris Salleh was no longer Chief Minister of Sabah and there was a change of government. This, the appellant contended, was the real reason for the determination of the contract.

The appellant's Counsel referred the Court to a memorandum P18 dated 3 May 1985 (Vol. 8, p. 2615) from a Mr. John Maluda of the Ministry of Agriculture and Fisheries Sabah addressed to the Minister. In P18 Mr. Maluda in para. 13 of that memorandum expressed an opinion regarding the slow progress of the work at the site and recommended the termination of the work. At the bottom of the memorandum contained the Minister's approval on 12 May 1985 that the contract be terminated subject to the reference of the matter to the State Attorney General as he expected legal problems. This Court was asked to put proper construction to this episode of termination in the light of the fact that the appellant's father-in-law was no longer the Chief Minister after the change of government and after the signing of the Letter of Intent on 3 April 1985 after the meetings on 18 March 1985 and the meeting of 30 March 1985. Can the termination be said to be on reasonable grounds?

The learned trial Judge examined this contention and he held at pp. 62 and 63 of the appeal records thus:

> With respect, I do not think it is quite correct to say that the note is a clear indication that the decision to terminate was made on 12 May 1985. From the note, the Minister in fact acted with caution and wanted the case to be referred to the Attorney General to see if there were sufficient grounds for termination. Looking at the contents of P18 (including the hand-written notes) as a whole the suggestion that the contract "be terminated in whatever manner" did not sound as bad as the plaintiff is trying to make it out to be.

We support the finding of the learned Judge that the termination was justified. While it was true that the appellant's father-in-law was no longer Chief Minister at the time of the termination of the contract and that the allegation might validly be made if not for anything more but then we were by law bound to respect the correct finding of the learned trial Judge at p. 77 of the appeal record as regards the progress of the work at the date of the termination of 4 July 1985 which is Farm P1 was 97% complete, Farm P2 54.13% complete and Farm B 44.05% complete. He further found in case of Farm B1 when handed over on 3 January 1985 only 0.5% progress was achieved in the 6 months until determination and in Farm B3 there was 0% activity for 6 months and then Farm B4 also showed no activity from handing over on 1 April 1985 for 3 months period. In respect of the processing plant and hatchery, only 50% piling work for the former and only form work and reinforcement for the ground beams were done for the latter. Then according to DW1's evidence, the progress of work in June 1985 was 0.7% for Farm B, 0.5% Farm P1, 0% for Farm P2 and 0.5% for Farm B2. The learned Judge found no improvement in the work progress. The learned Judge also rightly held in the face of this delay if more sites were to be handed over, the situation would be worse. In the face of this unsatisfactory progress one is tempted to ask "why not termination since the progress is minimal and further millions were going to be poured in?" We support the trial Judge's finding that the determination of the contract was justified.

Ground 9 was whether the learned trial Judge was right in awarding the respondent damages under the counterclaim.

In the judgment of the learned Judge at p. 78 of the appeal record the Judge relied on the evidence of DW6, DW7 and DW8. The learned Judge, after having accepted the cost of rectification amounting to RM97,388.25 and other expenses, held at p. 81 of the appeal record:

> In the result I agree with Counsel for the defendant that the state of the account between the plaintiff and the defendant was as follows:
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> | | | |
> |---|---|---|
> | 1. | Work done by plaintiff | RM3,075,139.99 |
> | 2. | Materials on site | RM1,080,007.00 |
> | | Total | RM4,155,146.99 |
> | Less: | | |
> | 3. | Additional cost and Defective work | RM1,043,469.88 |
> | | | RM3,111,698.11 |
> | Less: | Miscellaneous | RM94,421.23 |
> | | | RM3,017,275.90 |
> | Less: | Paid to plaintiff (including advance payment of RM3.7m) RM6,227,193.10 | |
> | | Amount due to defendant | RM3,209,917.20 |

The learned Judge held:

> For the reasons given above the claim of the plaintiff is dismissed with costs. There will be judgment for the defendant on its counterclaim for RM3,209,917.20 with interest at 8% per annum from the date of filing of the counterclaim and for costs.

We find no reason to disturb the well reasoned judgment of the learned Judge. We therefore dismiss this appeal with costs.

Abdul Malek b. Hj. Ahmad J:

I have had the advantage of reading the draft judgment of my learned brother Abu Mansor JCA and have nothing to add as I am in full agreement with him.

Hj. Mohd. Noor bin Hj. Ahmad J:

As a member of this panel, I wish to add that we were unanimous in dismissing this appeal. I have had the benefit of reading the judgment of my learned brother Abu Mansor Ali JCA, with which I associate myself.

However, I would like to deal briefly on the issue of estoppel which, according to Counsel for the appellant, the matter was never considered by the learned trial Judge though raised in the Court below. He contended before us that the respondent was estopped from denying the existence of a concluded contract based on the Letter of Intent because the appellant had already acted to his detriment in reliance upon it. In support thereof he asserted that

the appellant had furnished the additional letter of guarantee on 4 April 1985, a bank guarantee for an amount equivalent to 5% of the new contract price on 13 May 1995 in lieu of the performance bond given earlier and had ordered zinc sheets from Japan worth RM300,000.

In my view, the appellant was not relying on an estoppel based on a misrepresentation of existing fact but rather on the doctrine of promissory estoppel enunciated in the *High Trees* case which was based on a promise of future conduct. From the transaction or dealing between the parties, it is evidently clear that the 1984 contract would be substituted by another contract based on the new contract price only after the unsettled matters, as reflected in the minutes of the meeting on 30 March 1985 and the Letter of Intent, had been thrashed out and embodied in the supplementary agreement as envisaged to be executed before 30 April 1985.

For the promissory estoppel to apply the appellant must show that he had changed his position to his detriment, which was not in this case. From the documentary evidence, it is manifestly evident that the appellant had till the end been treating the 1984 contract as still in force. He changed his stance only for the purpose of litigation. To my mind, the giving of the additional letter of guarantee and the bank guarantee by the appellant was geared merely towards the execution of the supplementary agreement, which was never signed. Therefore, this plea failed. Furthermore, the doctrine operates only by way of defence and not as a cause of action, that is to say, it can only be used as a shield but not as a sword. (see *Combe v. Combe* [1951] All ER 767).

There is a peculiar aspect of the case which attracted me to dwell upon. It cannot be denied that the defective works and the shortcomings of the appellant in the performance of his obligations under the 1984 contract were discovered by the respondent long before the Letter of Intent was executed. The disputes that arose out of such discovery were settled by arbitration. Thereafter, the defective works and the shortcomings still persisted and yet these matters were never discussed at the meetings of 16 March 1985, 18 March 1985 and 30 March 1985. In the face of such scenario the Letter of Intent was executed intending to substitute the 1984 contract with the new contract price which was more than double the original contract sum. Immediately thereafter, a further advance of RM1,817,238.20 based on the new contract price was paid to the appellant. From these facts, I am inclined to believe and conclude that the respondent was eager to continue the contract with the appellant despite the fact that the performance by the appellant was most unsatisfactory. However, when the appellant's father-in-law ceased to be the Chief Minister after the mid-April 1985 State election events started to turn for the worse for the appellant which culminated in the determination of the contract by the respondent.

Queries: Since the defective works and the shortcomings of the appellant were discovered much earlier and still persisting, why did the respondent decide to continue with the contract to be based on the new contract price? Why the defective works and the shortcomings were not discussed at the three meetings? Why the respondent decided to terminate the contract only after the appellant's father-in-law had ceased to be the Chief Minister based on the same grounds which were available to the respondent to do the same much earlier had the respondent wanted to?

I am fully aware that it is not the function of this Court to inquire into the rationale behind the decision or policy of the respondent. However, this matter is highlighted in this judgment with a view to consider whether the allegation by the appellant, that the determination of the contract was wrongful because the respondent had acted unreasonably and vexatiously, holds water. My view is that, had there been no overwhelming evidence of defaults on the

part of the appellant in the performance of the contract as gathered both from the parol and documentary evidence including the photographs, the logical answers to these queries in the absence of a plausible explanation by the respondent would lend more weight to the appellant's allegation. Be that as it may, to my mind that conduct of the respondent under the circumstances merely tantamounts to the giving of indulgence to the appellant or an act of exceptional tolerance on the part of the respondent.

As I have indicated earlier, we were unanimous in dismissing the appeal and therefore we made the order as we did.